

**STATE OF MICHIGAN
IN THE SUPREME COURT**
(On Appeal from the Michigan Court of Appeals)

ANTHONY PELLEGRINO, as Personal
Representative of the Estate of
SHIRLEY ANN PELLEGRINO, Deceased,
and ANTHONY PELLEGRINO,
Individually,

Plaintiffs-Appellees,

v

AMPCO SYSTEM PARKING,

Defendant-Appellant.

Supreme Court No. 137111

COA Docket No. 274743

Case No.: 03-325462-NI

Hon. Michael J. Callahan

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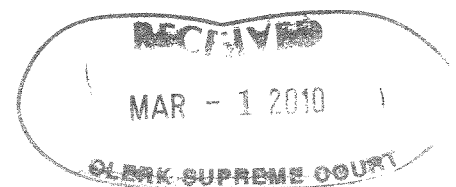
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**SUPPLEMENTAL AUTHORITY BY DEFENDANT-APPELLANT
AMPCO SYSTEM PARKING**

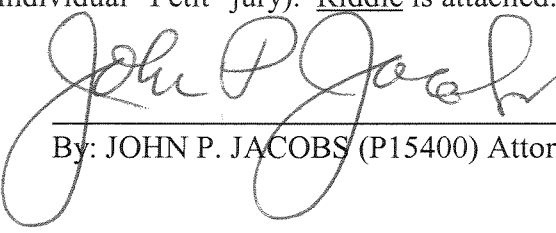
PROOF OF SERVICE



NOW COMES Defendant-Appellant, Ampco System Parking, Inc., by and through Undersigned Counsel, and pursuant to MCR 7.212(F), points out a new authority, attached, in the published case of United States v Riddle, ___ F Supp 2d ___; 2010 WL 99039, authored by Honorable Avern Cohn, which fully supports Defendant's position now in the Michigan Supreme Court. Riddle clarifies much confusion about "community representation" in this case, notably, Plaintiffs' "Fair Cross Section" call to justify Judge Callahan's actions. In rejecting Defendant Riddle's view that he was entitled to an individual ("Petit") Jury which mirrored the racial demographics of his community, Judge Cohn cited Taylor v Louisiana, 419 US 522 (1975) which rejected the notion that a Sixth Amendment "Fair Cross Section" of jurors can or should relate to **individual** Jury selection, and constitutionally, pertains at the most, if it does at all, to **system-wide** changes to reflect greater participatory democracy as a global, systemic response, not as a *sui generis*, single-jury, individualized or idiosyncratic reaction in a unique civil or criminal case.

The rejection of the concept that Sixth Amendment racial demographics compel "community representation" in a single case is behind Riddle, citing Taylor. See Batson v Kentucky, 476 US 79 (fn 6) (1986) (holding that the Sixth Amendment has never required individual juries to reflect the various distinctive groups of the population and that it would be **impossible** to apply as a Constitutional matter any rule supporting proportional representation of the community tailored to an individual, Petit Jury); Holland v Illinois, 493 US 474, 482-483 (1990) ("**We have never invoked the fair-cross-section principle to invalidate** the use of either for-cause or **peremptory challenges**"); Lockhart v McCree, 476 US 162, 173-174 (1986) (there is no Constitutional requirement to mirror the community; Batson should, in fact, be read as expressly declining to address "representational" challenges to discriminatory use of peremptory challenges in a individual "Petit" jury). Riddle is attached. Respectfully submitted,

Dated : March 1, 2010


By: JOHN P. JACOBS (P15400) Attorney For Appellant Ampco

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.
UNITED STATES of America, Plaintiff,
v.
D-4, Samuel L. **RIDDLE**, Jr., Defendant.
No. 09-20025.

Jan. 12, 2010.

Order Denying Reconsideration Jan. 19, 2010.

Background: In criminal prosecution, defendant moved to dismiss or for stay, alleging that voir die, which included nine African-Americans in pool of 100 prospective jurors, violated his Sixth Amendment right to be tried by jury representing fair cross-section of community.

Holdings: The District Court, Avern Cohn, J., held that:

- (1) process of creating "master jury wheel," rather than composition of prospective jurors, was proper basis for challenge, and
- (2) order used to create defendant's master wheel was functionally equivalent to prior constitutionally-valid order.

Motion denied.

West Headnotes

[1] Jury 230 ⚡33(1.1)

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k33 Constitution and Selection of Jury

230k33(1.1) k. Representation of Community, in General. Most Cited Cases

A defendant must show three elements in order to establish a prima facie violation of the fair cross-section requirement for juries under the Sixth

Amendment: (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to the systematic exclusion of the group in the jury-selection process. U.S.C.A. Const.Amend. 6.

[2] Jury 230 ⚡117

230 Jury

230V Competency of Jurors, Challenges, and Objections

230k114 Challenge to Panel or Array, and Motion to Quash Venire

230k117 k. Time. Most Cited Cases

Timeliness requirement under Jury Selection and Service Act (JSSA), providing that a motion to dismiss the indictment or stay proceedings on the ground of failure to comply with JSSA must be made before voir dire begins or within seven days after the defendant discovered or could have discovered the grounds for the motion, whichever is earlier, is to be strictly construed and failure to comply precisely with its terms forecloses the challenge. 28 U.S.C.A. § 1861, et seq.

[3] Jury 230 ⚡33(1.1)

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k33 Constitution and Selection of Jury

230k33(1.1) k. Representation of Community, in General. Most Cited Cases

Sixth Amendment's fair cross-section requirement for juries applies only to the larger pool serving as the source of prospective jurors' names and not to the petit jury sworn for a defendant's trial, and thus guarantees the opportunity for a representative jury venire, but not a representative venire itself. U.S.C.A. Const.Amend. 6.

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[4] Jury 230 ⚡33(1.15)

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k33 Constitution and Selection of Jury

230k33(1.2) Particular Groups, Inclusion or Exclusion

230k33(1.15) k. Race. Most Cited

Cases

Process of using voter registration, drivers' license, and personal identification card lists to create "master jury wheel" for jury selection, rather than composition of 100 prospective jurors who came to courthouse and filled out questionnaires, was proper focus in demonstrating systematic exclusion of African-Americans in violation of defendant's Sixth Amendment right to be tried by jury representing fair cross-section of community. U.S.C.A. Const.Amend. 6.

[5] Jury 230 ⚡33(1.1)

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k33 Constitution and Selection of Jury

230k33(1.1) k. Representation of Community, in General. Most Cited Cases

Administrative order used to create defendant's "master jury wheel" was functionally equivalent to prior order that had been found to be constitutionally valid, precluding defendant's challenge to jury selection process as violating his Sixth Amendment right to be tried by jury representing fair cross-section of community; only differences between orders related to numbers used to create master wheel and proportional representation by county, but manner in which names were drawn was still governed by court's juror selection plan. U.S.C.A. Const.Amend. 6.

[6] Jury 230 ⚡121

230 Jury

230V Competency of Jurors, Challenges, and

Objections

230k114 Challenge to Panel or Array, and Motion to Quash Venire

230k121 k. Trial and Determination. Most Cited Cases

Defendant was not entitled to reconsideration of court order denying his objection to jury selection process as violating his Sixth Amendment right to be tried by jury representing fair cross-section of community; court correctly ascertained that defendant's basis for challenge was composition of 100 prospective jurors, rather than process for creating "master jury wheel" for jury selection, and court considered challenge to master wheel and found order used to create defendant's jury to be functionally equivalent to prior constitutionally-valid order. U.S.C.A. Const.Amend. 6.

Robert P. Cares, David A. Gardey, U.S. Attorney's Office, Detroit, MI, for Plaintiff.

John Minnock, Cramer & Minnock, Ann Arbor, MI, Edward Wishnow, Birmingham, MI, for Defendant.

MEMORANDUM AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE TO STAY PROCEEDINGS, AND FOR AN EVIDENTIARY HEARING (DKT.# 109)

AVERN COHN, District Judge.

I.

*1 This is a criminal case. Voir dire began on January 5, 2010 when 100 prospective jurors were called to the courthouse and filled out a detailed questionnaire. Individual voir dire began on January 11, 2010. Before the Court is defendant's motion to dismiss, or in the alternative to stay proceedings, and for an evidentiary hearing. Defendant argues that, because there were only nine African-Americans in a pool of 100 prospective jurors, there is an under representation of African-Americans

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which violates his Sixth Amendment right to be tried by a jury which represents a fair cross section of the community. He further argues that this under representation violates the Jury Selection and Service Act, 28 U.S.C. § 1861 *et seq.* (JSSA), which requires that the nine counties from which the jurors are drawn be “substantially proportionally represented in the jury master wheel.” 28 U.S.C. § 1863(B)(3).

For the reasons that follow, the motion will be denied. As will be explained, defendant's contention that the composition of the 100 prospective jurors shows a systematic exclusion of African-Americans is misplaced. To the extent he is challenging this district's juror selection plan, the issue has been decided by another judge who held the process passes constitutional muster. *See United States v. Bates*, No. 05-81027, 2009 WL 5033928 (E.D.Mich. Dec.15, 2009).^{FN1}

II.

A.

The Eastern District of Michigan covers 34 counties in Michigan's lower peninsula. For jury-selection purposes, the district is split into five divisions; each division draws jurors from a certain number of counties. The Court sits in the Detroit Division, which selects its jurors from nine counties: Jackson, Lenawee, Macomb, Monroe, Oakland, St. Clair, Sanilac, Washtenaw and Wayne. The juror selection plan in this district and approved by the Judicial Council for the Sixth Circuit was established by administrative order. *See* E.D. Mich. Admin. Order No. 00-AO-083 § (d) (Dec. 26, 2000) [hereinafter Juror Selection Plan]. Under the Juror Selection Plan, the Clerk of the Court must generate a Master Jury Wheel for each of the district's five divisions, ensuring that “each county within a division is proportionally represented.” Juror Selection Plan § (h)(2). Voter registration lists are used to calculate the proportional repres-

entation of individual counties. The proportional representation determination dictates how many names to draw from each county to compose the division's Master Jury Wheel. The names are obtained by random selection from voter registration lists, the state drivers' license list, and state personal identification card list. Juror Selection Plan § (f).

In *Bates*, the district court explained the process in detail:

The jury-selection process begins when the Eastern District's Jury Department obtains three lists from the Michigan Secretary of State: registered voters, licensed drivers, and holders of state-issued identification documents.... The Jury Department provides the list of registered voters to Sutera Data Systems (“SDS”), a data-processing firm contracted to compile the Master Wheel ... SDS determines the number of registered voters in each of the nine counties comprising the Detroit Division, and calculates each county's proportionate share of the Division's total voting population. Based on these figures, the Court issues an Administrative Order to create a new Master Wheel for the Division, in which it specifies the number of people to be drawn from each county for possible jury service.... The Jury Department next provides the list of licensed drivers and holders of state-issued ID cards to SDS, with instructions to create the Master Wheel; it is to be filled with actual names of potential jurors. SDS begins by making separate lists of 5 licensed drivers and state ID holders for each county in the Division. Next, for each county, SDS merges the three lists (registered voters, licensed drivers, people with state-issued IDs) and eliminates duplicate names.... Finally, SDS selects names at random from the merged list for each county, based on the proportions set forth in the Administrative Order, to create the Master Wheel.... In the next step, the Jury Department randomly draws 5,000 names from the Master Wheel and sends juror questionnaires to these people.... The Jury Department then pro-

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cesses the completed questionnaires and decides who is not qualified or who should be excused. Noncitizens, convicted felons, and people who cannot read and write English, among others, are disqualified from jury service under federal law.... Active members of the armed forces, police and fire department members, and certain public officials are also exempt.... The Eastern District also exempts people over 70, firefighters and ambulance crews, and persons who served on a jury within the last two years ... Once unqualified and exempt respondents are eliminated, what remains are the completed questionnaires of people who will make up the Detroit Division's Qualified Jury Wheel ("the Qualified Wheel"). In the final step, the Jury Department randomly draws a "jury pool" of about 400 people from the Qualified Wheel. As they are selected, each person is assigned a number from one to 400; when they are called to service, jurors are called in sequence, starting with the number one. A given jury pool remains on call for two weeks, and its members must be ready to report on a day's notice.

*2 *Bates*, 2009 WL 5033928 at * 2-3 (internal citations omitted).

B.

As described above, there are several levels of jury selection. First, there is the selection of the Master Wheel. The second level is the random selection of prospective jurors from the Master Wheel. The third level is the creation of the Qualified Wheel from those jurors. Obviously, this number varies depending on the number of individuals who are not qualified or are exempted from service. The fourth level is the "jury pool" of names (approximately 400) which are randomly selected from the Qualified Wheel.

Here, the group of 100 prospective jurors who came to the courthouse and filled out questionnaires was part of the "jury pool," not the Master Wheel or the

Qualified Wheel. Defendant relies on the composition of the 100 prospective jurors to argue that African-Americans are systematically excluded from jury service in violation of the Sixth Amendment and the JSSA. Defendant therefore asks that the indictment be dismissed, or stayed pending an evidentiary hearing on the issue of jury selection in this district.

III.

[1] The Sixth Amendment requires that jury panels be drawn from a source representing a "fair cross section" of the community in which the defendant is tried. *Taylor v. Louisiana*, 419 U.S. 522, 536, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). In *Duren v. Missouri*, the Supreme Court set forth the three elements that must be shown to establish a prima facie violation of the "fair cross-section" requirement: (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to the systematic exclusion of the group in the jury-selection process. 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979).

[2] Likewise, the JSSA is designed to secure in federal courts a trial by a jury "selected at random from a fair cross section of the community," 28 U.S.C. § 1861, from which no citizen is excluded on the basis of invidious discrimination, *id.* § 1862. To that end, the Act provides that federal district courts must devise a plan for random selection of grand and petit jurors, *id.* § 1863, and sets forth procedures for drawing names from a master wheel and summoning, qualifying, and impaneling jurors for service, *id.* §§ 1864-66. The Act also permits a defendant to move to dismiss the indictment or stay proceedings "on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury." *id.* § 1867(a). However, such a motion must be made "before the voir dire

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examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, **whichever is earlier**” *id.* at § 1867(a) (emphasis added). This timeliness requirement “is to be strictly construed, and failure to comply precisely with its terms forecloses a challenge under the Act.” *United States v. Ovalle*, 136 F.3d 1092, 1098 (6th Cir.1998) (quoting *United States v. Bearden*, 659 F.2d 590, 595 (5th Cir.1981), *cert. denied*, 456 U.S. 936 (1982)); *see also United States v. Young*, 570 F.2d 152, 153 (6th Cir.1978); *United States v. Bates*, No. 05-81027, 2009 WL 3270190 (E.D.Mich. Oct.9, 2009).

*3 The JSSA also requires that the motion contain “a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of this title.” 28 U.S.C. § 1867(d).

IV.

A.

As an initial matter, there are procedural problems with defendant's motion. Defendant's statutory claim could be considered untimely, as the government urges. Defendant did not file a JSSA challenge prior to the voir dire examination which began on Tuesday, January 5. Defendant says that the basis for the motion-the pool of 100 prospective jurors-was not known until later. However, defendant argues that the under representation of African-Americans has been a “chronic problem for years.” (Defendant's Motion at p. 1). This statement implies that defendant was aware of the alleged infirmities in jury venires in this district before jury selection began and could have filed the motion well in advance of the trial, and certainly before voir dire began. Additionally, as the government points out, defendant did not include a sworn statement with the motion as required by the JSSA.^{FN2} *See* 28 U.S.C. § 1867(d).

B.

[3] Putting these issues aside, defendant's contention that the jury selection is infirm based on the racial composition of the 100 prospective jurors is misguided. While defendant is not attacking the petit jury, which has yet to be selected, his attack improperly focuses on the smaller panel of 100 prospective jurors, not the larger Master Wheel from which all names are drawn. In *Taylor*, the Supreme Court stated:

It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. **Defendants are not entitled to a jury of any particular composition**, *Fay v. New York*, 332 U.S. 261, 284, 67 S.Ct. 1613, 1625, 91 L.Ed. 2043 (1947); *Apodaca v. Oregon*, 406 U.S., at 413, 92 S.Ct., at 1634 (plurality opinion); but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.

419 U.S. at 538 (emphasis added). Thus, the Supreme Court has explained that the Sixth Amendment's “fair cross-section” requirement applies only to the larger pool serving as the source of prospective jurors' names and not to the petit jury sworn for a defendant's trial. The Sixth Amendment therefore “guarantees the opportunity for a representative jury venire, not a representative venire itself.” *United States v. Jackman*, 46 F.3d 1240, 1244 (2d Cir.1995) (citing *Roman v. Abrams*, 822 F.2d 214, 229 (2d Cir.1987), *cert. denied*, 489 U.S. 1052, 109 S.Ct. 1311, 103 L.Ed.2d 580 (1989)).

[4] Defendant cannot rely solely on the composition of the 100 prospective jurors to demonstrate systematic exclusion. Courts have rejected similar challenges. In *Jordan v. Walker*, No. 01-CV-0507, 2007 WL 2344861 (W.D.N.Y. Aug.14, 2007), there

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was only one African-American juror in the second pool of prospective jurors called for jury duty. The district court found that the “the fact that there was only one black juror in a pool of 104 potential jurors does not, in and of itself, establish the *Duren* requirements of unfair underrepresentation and systematic exclusion.” *Id.* at *7. Moreover, in *United States v. Joyner*, 201 F.3d 61, 75 (2d Cir.2000), the defendant argued that his Sixth Amendment right to a jury of his peers was violated as the venire contained only one African-American out of 500 prospective jurors. The Second Circuit disagreed and stated that defendant “failed to establish a prima facie case because he made absolutely no showing that African Americans were systematically excluded or that the district court’s use of voter registration and motor vehicle bureau lists to select the venire result[ed] in unfair underrepresentation.” *Id.* (citing *Duren v. Missouri*, 439 U.S. at 364). Finally, in *United States v. Booker*, No. 05-1929, 2007 WL 2492427 (6th Cir. Sept.5, 2007), the defendant argued that jury venire did not represent a fair cross section of the community, particularly as to African Americans and Hispanics, in violation of the Equal Protection Clause, the Sixth Amendment and the JSSA. The Sixth Circuit rejected this argument, noting that defendant did not show “that the representation of either group was not ‘fair and reasonable,’ *Duren*, 439 U.S. at 364, which is to say, that either of these groups was ‘substantially underrepresented’ in the **jury wheel**,” *Booker* at *2. (citing *Castaneda v. Partida*, 430 U.S. 482, 495 n. 14, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977)) (emphasis added). Thus, defendant has improperly focused on the composition of the 100 prospective jurors, rather than the process for creating the Master Wheel, in making his claims.

C.

*4 [5] Finally, the constitutionality of the Juror Selection Plan was fully considered in *Bates*. The district court found the process constitutional, although imperfect.^{FN3} Although defendant argues that *Bates* is not persuasive because the jury in that

case was selected pursuant to a different administrative order, this argument is not well-taken. The Master Wheel in the *Bates* trial was selected pursuant to E.D. Mich. Admin. Order No. 04-AO-0116 (Feb. 4, 2004). The Master Wheel in this case was selected pursuant to E.D. Mich. Admin. Order No. 08-AO-033 (Aug. 5, 2008). The only differences in the administrative orders relate to the numbers used to create the Master Wheel and the proportional representation by county. The way in which names are drawn is still governed by the Juror Selection Plan. In short, there is no functional difference in the jury selection process used in *Bates* and the process used in this case.

V.

For the reasons stated above, defendant’s motion is DENIED.

SO ORDERED.

ORDER DENYING MOTION FOR RECONSIDERATION

I.

This is a criminal case. Voir dire began on January 5, 2010 when 100 prospective jurors were called to the courthouse and filled out a detailed questionnaire. Individual voir dire has been completed and a jury of 16 has been empaneled. Opening statements and the proofs will begin on January 25, 2010.

Before the Court is defendant’s motion for reconsideration of the denial of his motion to dismiss, to stay proceedings, or for an evidentiary hearing which challenged the jury selection process. See Memorandum and Order filed January 12, 2010 (Dkt.# 112). For the reasons that follow, the motion is DENIED.

II.

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Motions for reconsideration are governed by E.D. Mich. LR 7.1(g) which provides in relevant part:

Generally, and without restricting the court's discretion, the court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by implication.

The movant must not only demonstrate a palpable defect by which the court and the parties have been misled but also show that correcting the defect will result in a different disposition of the case.

III.

[6] Defendant says that reconsideration is warranted because the Court misunderstood the grounds of his motion. Defendant says he was not basing his challenge to the jury selection process on the composition of the 100 prospective jurors called to fill out questionnaires, but rather was making a broader attack on the selection of the master jury wheel. He also says he requested a stay in order to examine into the creation of the master jury wheel. This argument lacks merit. A fair reading of defendant's motion shows his attack was based on the composition of the 100 prospective jurors. Indeed, in order to overcome an obvious timing problem with respect to his statutory claim, defendant said that he brought the motion after seeing the composition of the 100 prospective jurors. Moreover, defendant not only requested a stay, but also dismissal of the indictment. The latter request is clearly not premised on having an investigation into the jury selection process. Indeed, in the present motion, defendant again asks for dismissal of the indictment *or* a stay. Given the present posture of the case, a request for dismissal is fatuous. Finally, the Court did consider defendant's motion as making an attack on the master jury wheel and specifically found that the Administrative Order ^{FN1} used to create defendant's jury was functionally identical to the Administrative Order ^{FN2} used to create the master jury wheel

in the *Bates* ^{FN3} case. Defendant makes no argument that the Court erred in this finding or otherwise attempts to explain the differences in the Administrative Orders.

SO ORDERED.

FN1. Bates filed a Notice of Appeal on December 29, 2009.

FN2. Also, it is worth noting that there is administrative order pertaining to challenges to the jury selection process, including the disclosure of juror information, which contemplates reference of the matter to the Chief Judge. *See* E.D. Mich. Admin. Order No. 00-AO-060 (June 5, 2000).

FN3. The Court has some familiarity with the imperfections in the process. *See* David R. Sherwood and Avern Cohn, *The Rise and Fall of Affirmative Action in Jury Selection*, 32 U. MICH. J.L. REF. 325 (1999).

FN1. *See* E.D. Mich. Admin. Order No. 08-AO-033 (Aug. 5, 2008).

FN2. *See* E.D. Admin. Order No. 04-AO-0116 (Feb. 4, 2004).

FN3. *United States v. Bates*, No. 05-81027, 2009 WL 5033928 (E.D.Mich. Dec.15, 2009).

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